U.S. Department of Labor

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Issue date: 25Jun2001

CASE NO.: 2000-LHC-00173

OWCP NO.: 7-142863

In the Matter of:

MICHAEL BARTLEY,
Claimant

v.

BAGWELL BROTHERS,
Employer
and

BANKERS' INSURANCE CO.,
Carrier

APPEARANCES:

Aaron Allen, Esq.
For Claimant

Elizabeth Smyth Sirgo, Esq.
For Employer/Carrier

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"). The claim is brought by Michael Bartley, Claimant, against his former employer, Bagwell Brothers, Respondent and Bankers Insurance Co., Carrier. A hearing was held in Jefferson, Texas on December 7, 2000, at which time the parties were

represented by counsel and given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1;

2) Claimant's Exhibits Nos. 1-3, 18, 23, 25-37; and

3) Respondent's Exhibits Nos. 1-37.[1]

Upon conclusion of the hearing, the record remained open for additional exhibits and the submission of post hearing briefs, which were received by both parties.[2] This decision is being rendered after having given full consideration to the entire record.

STIPULATIONS[3]

After an evaluation of the record, this Court finds sufficient evidence to support the following stipulations:

(1) The date of the injury/accident was November 10, 1996;
(2) The fact of the injury/accident is not disputed;
(3) Claimant's accident occurred during the course and scope of his employment with Respondent on a platform located more than three miles off of the Louisiana Gulf Coast. Claimant was injured when a piece of grating fell from the above landing onto his right hip;
(4) An employer/employee relationship existed at the time of injury;
(5) The alleged injury arose in the course and within the scope of employment;
(6) The date Respondent was notified of the injury was November 10, 1996;
(7) The date of notification of the injury/death pursuant to Section 12 of the Act to Respondent was November 10, 1996;
(8) An informal conference was held September 1, 1999;
(9) Whether disability resulted from the injury is disputed;

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[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

[2]Respondent submitted the curriculum vitae of Nancy Favaloro as RX-38 after the formal hearing and without objection.

[3]JX-1

(10) Medical benefits have been paid in the amount of $22,990.32 through August 30, 2000. Claimant alleges he is owed additional compensation benefits and outstanding and future medical expenses;

(11) The amount of compensation for disability already paid to Claimant is disputed along
(12) with the nature of the disability;
(13) Claimant's average weekly wage is $517.68;
(14) Maximum medical improvement is disputed.

ISSUES

The unresolved issues in this proceeding are:

(1) Nature and Extent of Disability/Loss of Wage Earning Capacity;
(2) Claimant's ability to return to work;
(3) Reasonable and Necessary Medical Expenses;
(4) Whether additional medical, indemnity and/or mileage reimbursement benefits are owed;
(5) Whether Claimant is entitled to Vocational Rehabilitation benefits.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Michael Bartley

Michael Bartley, Claimant, testified that he is currently taking Buspar, Xanax, LorTab 10, and Paxil. He stated that these medications were prescribed for him by Drs. Armistead, Dane, and Brunnen. He testified that he received a tenth grade, high school education but never received his GED. Claimant admitted to being convicted in 1995 of possession of marijuana with intent to distribute, a felony. Claimant added that he has never undergone any vocational technical training or military service. He stated that his first job was pumping gas, followed by employment in a machine shop. He added that he became employed in the laborer and offshore positions in 1975. Claimant testified that he was initially employed offshore as a roustabout for approximately four years. He stated that he returned to offshore work as a roustabout, foreman, and crane operator after interim employment as a truck driver. He stated that as a crane operator, he used hydraulic cranes. Claimant added that he would load and unload crew boats, hang pipe, and move material around the platforms. He testified that he became a welder in 1980 and performed both land and offshore contracts out of Louisiana. Claimant stated that he worked for a company called

Badger Welding doing structural and pressure pipe welding offshore. He added that this company changed from Badger Welding to Bagwell Brothers, Respondent, approximately two to four years after he began working for it. He stated that he did well in the business of construction of offshore platforms. TR. 25-32.

Claimant testified that his job duties did not change during his employment with Respondent. He explained that he was required to move into various positions for certain welding projects, climb, and hang when necessary. He stated that the job involved a lot of vigorous lifting. Claimant added that his welding jobs could last anywhere from a week to three months in duration. He stated that he would drive from his home in Shreveport to the necessary dock and get to the offshore platform by helicopter or boat. Claimant testified that the accident occurred on the morning of November 10, 1996, while he was welding on an offshore platform, the Ship Shore 183A. He stated that he did not know how far offshore the platform was. Claimant added that he was laying on his left side and welding overhead when a piece of grating, weighing 100 to 150 pounds, fell and struck him in the hip. TR. 32-35.

Claimant testified that the crew had to haul him up from the welding site in the personnel basket to the main platform. He was then taken to the office, where he laid on the couch. He stated that he informed his supervisor, Jimmy Pierce, and Frank Cannon, field foreman, who indicated he did not think that Claimant was hurt. He stated that it was afternoon before he was able to get a helicopter ride to the shore. Claimant added that Respondent's personnel would not request an air med. for him, nor would they administer any treatment. He testified that he was flown to the hospital, where he had to wait for a long period of time to get treatment. TR. 36-41.

Claimant testified that after he returned to Shreveport, he sought treatment from Dr. Zum Brunnen, an orthopedist. He stated that Dr. Brunnen prescribed Lortab 10, but could not figure out what was wrong with him. He stated that he was finally given a bone scan and physical therapy about six to seven weeks after the accident occurred. He testified that he used crutches until March, 1997. Claimant added that during that time, he tripped on the crutches and fell on his porch, causing bruising to his head. He testified that he was in constant pain throughout his physical therapy. Claimant added about four to six weeks after the accident, he sought psychological treatment for depression from Dr. Islam. He testified that he was depressed because of an accumulation of events, including sudden deaths in his family. Additionally, he was angry about not receiving any compensation and the feeling that he was not getting the help that he thought he needed. He testified that he was not able to eat or sleep regularly and experienced flashback memories of the accident. Claimant stated that he had never experienced any prior episodes of depression. Claimant testified that he was not able to afford Dr. Islam on a continual basis and was instead referred to Dr. Ben Hayes, a psychiatrist. He stated that he underwent several psychological interviews and evaluations at a hospital, but was never able to obtain the results. Claimant testified that physically, he has constant pain in his hip and his lower back. He described that pain as consistent with a chronic bruise.

He stated that he was constantly told that he was improving, but could not feel any difference. TR. 42-54.

Claimant testified that Respondent twice offered him an alternative job as a tool attendant, which supposedly required no reaching, bending, or constant sitting. He stated that this description

was inconsistent from his personal knowledge of the actual job requirements. Claimant added that Respondent offered to pay him $20 per day and pay for his motel room to avoid a commute from Shreveport. He stated that he was unable to drive long distances because of pain in his back and his leg. He stated that the second time Respondent offered him the job, he had communicated to his doctor that he could not drive for long distances. Claimant stated that the job, tendered in 1997, 1998, and 1999 was located in Delcambre, which is in south Louisiana. TR. 55-59, 132.

Claimant testified that on several occasions, he attempted to work in his yard and do other activities in order to assess his pain tolerance. He stated that he was unable to do any of these activities. Claimant added that he disagreed with Dr. Brunnen's opinion that he had reached maximum medical improvement on May 20, 1998. TR. 60-65.

Claimant testified that he was involved in a car accident on January 20, 1999. He stated that he did not experience any new symptoms after the accident. Claimant stated that he exacerbated his back pain in September, 1999 after aiding his brother in washing a boat. He testified that he was aggravated with his doctors for not being able to alleviate his pain. He added that he also experienced panic attacks as early as December, 1996. TR. 71-73, 128.

He testified that he currently experiences the same pain in his leg, hip, and lower back. Claimant testified that he currently experiences the same pain in his leg, hip, and lower back. Claimant added that sitting in a certain position helps him by taking the weight off of the side that hurts. He testified that he can no longer hunt or fish. Claimant stated that he constantly has to change positions and cannot stand for prolonged periods of time. TR. 73-74.

Claimant stated that he put in several applications for jobs, beginning in August, and was finally hired by a printing company as a laborer in October, 2000. He gave his job duties as cleaning a warehouse, putting boxes away, and doing deliveries. He stated that he was able to take his time in driving to do the deliveries. Claimant added that he was paid $7.50 per hour and was hired by a friend. He stated that he was only able to physically do the work for a week and was let go. Claimant testified that he did not think he would be able to operate a crane or do any employment where he would have to drive for prolonged periods. He added that he believed he drove more miles than was indicated in the mileage logs for his doctor visits. Claimant testified that Dr. Galloway, the vocational rehabilitation counselor did not actually locate any job positions for him. He stated that he did not think he could do any of the jobs

positions that Nancy Favaloro, vocational rehabilitation counselor, listed for him. He added that he disagreed with the medical conclusions that he could be employed in those positions. Claimant testified that he did not believe that there was a light duty position available for him in the onshore tool room. TR. 75-81, 85-92.

Claimant testified that he had not begun looking for employment until October, 2000. He stated that he remembered undergoing a functional capacity evaluation with Dr. Osborne in which

he squat-lifted 149 pounds of weights. He stated that he could do lifting, but that he would "suffer" for it the following days. He added that he disagrees with all of the doctors who claim that he could physically return to work. Claimant denied any pre-existing personality disorder and insisted that he was "normal" prior to the accident. TR. 94-100, 108.

Claimant testified that he had received approximately two weeks of vacation pay as income since the accident on December, 1996. He did not dispute that he received approximately $13,206 from Respondent from November 22, 1996 through June 6, 1997 on a weekly basis and was not working during that time. He stated that he began getting his checks from Carrier in the amount of $345.17 beginning in March, 1997. Claimant stated that Respondent and Carrier terminated his compensation in October, 1997. He admitted that his medical bills were being paid and that Carrier authorized further psychotherapy with Dr. Dean and Dr. Islam. He testified that he sustained no new back pain during his automobile accident. TR. 110-120.

Anthony Montalbano, Jr.

Mr. Montalbano testified that he is employed by the Special Claims program, which handled claims for Carrier at the time of Claimant's accident. He added that he was the adjuster for Claimant's workers' compensation claim from its inception to the present. Mr. Montalbano stated that during the payment of Claimant's compensation, it came to his attention that there was an overpayment issue. He testified that he was under the impression that Respondent had stopped paying Claimant, and Carrier would resume the payments. He stated that his solution was to deduct a specified amount from the current compensation until the overpayment amount was satisfied. He added that the resolution was accomplished, and that there was no longer a balance owed. Mr. Montalbano testified that the benefits were discontinued on November 2, 1997, because of Claimant's medical records and his release to light duty. He stated that the light duty position offered to Claimant was the tool room attendant position. He testified that Dr. Brunnen signed off on the job description and that the position was available to Claimant at the time that the job description analysis was prepared. TR. 136-142.

Mr. Montalbano added that the tool room attendant position was described to him as light duty and would allow Claimant to sit or stand at his leisure. He added that per diem, room, and board were also offered to Claimant. Mr. Montalbano stated that Carrier recommenced paying benefits on February 4, 1998, because a physician gave a fifty mile limitation on driving. He stated that the situation could have been resolved by allowing Claimant to take frequent breaks and stops along the route. Mr. Montalbano testified that benefits were terminated in October,1998, because a light duty position was still available for Claimant. He added that Carrier has paid all medical bills presented to it, as well as corroborated mileage statements. Mr. Montalbano stated that Claimant did not seek authorization for treatment with Drs. Jones and Islam. He stated that he considered the

treatments unauthorized and added that Carrier never received any reports from the physicians. Mr. Montalbano testified that he did not receive any notification that Claimant was seeking vocational rehabilitation services through the Department of Labor. TR. 145-165, 183.

Lynette Sigue[4]

Lynette Sigue testified by deposition that she is currently employed as a key estimator and purchasing manager with New Century Fabricators. She stated that prior to this position, she was employed by Respondent as a safety/personnel manager. Ms. Sigue added that any accident-related injuries were reported by her to Roger Bagwell. She stated that her duties included filling out an accident report whenever an injury occurred, ensuring that the injured worker received medical care, trying to get the employee back to work as soon as possible, and acting as the liaison with the insurance carrier. RX-33, pp. 5-8.

She testified that Respondent offered Claimant a light-duty position as either an assistant to the offshore dispatcher or a tool room attendant on several occasions. Ms. Sigue stated that these positions were listed in her letter dated January, 1997. She stated that the tool room position would be in the Delcambre shop and would consist of handing employees the necessary tools. She stated that the level of activity required would depend both on how many tool room attendants were at work and how busy the tool room was on a given day. Ms. Sigue described this shop as the on-shore tool room and distinguished it from the offshore equipment room. She added that Whitney Vincent was working in the offshore equipment room in 1996 and not the shop tool room. Ms. Sigue's perception of a light duty position was one that required either no lifting or minimal lifting. Ms. Sigue added that it was her job to familiarize herself with the physical demands of the light duty positions. She stated that the tool room position would require

[4]Lynette Sigue also testified regarding the contents of certain correspondence sent by her office regarding Claimant's case. These pieces of correspondence are reproduced at RX-2 and RX-34.

occasional lifting of approximately ten to fifteen pounds. Ms. Sigue stated that the jobs were tendered to Claimant at his normal wages as a welder. She testified that her goal was to gradually re-introduce Claimant into the workplace, and that these positions were transitional in nature. She added that the job description analysis of the tool room position was accurate in that it gave the lifting requirements as 0 to 20 pounds, as opposed to the 10 to 15 pounds she had originally estimated. Ms. Sigue stated that Claimant's brother, David Bartley, was not involved in choosing these alternative positions, nor was he in charge of supervising the onshore tool room. RX-33, pp. 8-20, 26, 51-52.

Ms. Sigue testified that it was her impression that from January 21, 1997 to the time she left in March, 2000, that both positions were still available for Claimant. She stated that she also arranged for per diem compensation, room, and board for Claimant, which would be similar to his

arrangements during his offshore employment. She added that Respondent placed other injured offshore employees in similar positions with the same pay rates as they would receive doing offshore employment. Ms. Sigue stated that these were necessary and permanent positions within Respondent's facility. She testified that at the time she left Respondent's employment, three people were employed in the tool room as attendants. She stated that the job duties of all three were essentially equal, but that one was an injured employee. Ms. Sigue testified that Respondent did not advertise outside of the company to fill these positions, because there was always someone available internally to fill in. She stated that the pay rate for these positions was dependent on experience. Ms. Sigue testified that Claimant was offered a job requiring a five-day work week, as opposed to a hitch shift. She added that Claimant's lodging would be paid on the days when the tool shop was closed as well. Ms. Sigue stated that to the best of her knowledge, Claimant was not offered retraining at Respondent's facility. RX-33, pp. 18-25, 29-30, 41-42.

David Bartley

David Bartley testified by deposition that he is Claimant's brother. Mr. Bartley stated that he was not being paid by Claimant's counsel for his testimony, but was on salary with his current employer. He listed his current employment as being the offshore operations manager for Acadian Contractors. He stated that prior to his employment with Acadian, he worked for Respondent for seventeen years. He began as a roustabout and progressed to the position of offshore superintendent. His position prior to leaving Respondent's employment was the offshore operations manager, the position that he held in November, 1996. Mr. Bartley stated that he left Respondent's employment under favorable terms and was asked by Claimant's attorney to testify as to what he knew about the tool room attendant position. He added that he knew, through his family, that Respondent had requested that Claimant work in the tool room. Mr. Bartley added that he had not suggested that Claimant be given a job in the tool room. Mr. Bartley testified that he was not on the platform on the date of Claimant's accident. CX-32, pp. 7-9, 20-23, 26-31.

Mr. Bartley stated that he only had one individual working for him as an attendant in the offshore tool room. He listed the duties of this person as loading equipment for offshore jobs, along with the tools and preparing the crew to do whatever construction project they were assigned. The tool room person was also required to maintain the equipment when not in use. Mr. Bartley opined that the weight of the tools could range from a half pound hammer to a one-hundred pound hammer, depending on the project. Additionally, welding rods, ranging from fifty to one-hundred pounds would be loaded. Mr. Bartley describe the activities involved as repetitive pushing, pulling, stooping, and climbing. He stated that the tool room person was required to be present every day in the tool room. He added that the same person was present in the tool room for the entire five years that he was supervising. CX-32, pp. 10-20.

It was his opinion that the job of the tool room attendant was physically demanding and required working anywhere from forty to eighty hours per week, as well as constantly being on call. He added that the tool room person was allowed to have an assistant, normally a roustabout, when the company got extremely busy. Mr. Bartley stated that there would be no place for the tool room person to lay down when he got tired, nor would the job be able to continue if the individual was under narcotic medication. Mr. Bartley stated that he believed the salary for the tool room attendant to be $10.00 per hour, and $5.00-$7.00 per hour for the assistants. He added that, to the best of his knowledge, Claimant never worked in the tool room after his accident. Mr. Bartley stated that he was not aware of any light duty positions offshore, although he acknowledged that those positions could be created in the shore-based operations. CX-32, pp. 20, 33-35, 66-67.

Whitney Vincent

Mr. Vincent testified that he has been involved in the offshore construction business for twenty-eight years. He added that Claimant was both a friend and a co-worker while he was employed with Respondent. He stated that he is currently employed by Acadian Contractors, where he works in the tool room. He added that prior to his current employer, he worked for Respondent in the offshore tool room. Mr. Vincent described his job as loading toolboxes with essentially every type of equipment used in offshore construction. He gave the heaviest type of lifting as approximately one-hundred and twenty to one-hundred and fifty pounds. Mr. Vincent stated that David Bartley was his supervisor in the offshore tool room. He stated that the job did not require hitch shifts, he had to be there everyday and was on twenty-four hour call. Mr. Vincent testified that he was terminated from Respondent's employment due to lack of available work. CX-33, pp. 1-10, 14, 29.

Mr. Vincent testified that he did not work in the shore-based tool room for Respondent, but was

aware of the duties of the tool room attendant. He stated that the duties were essentially the same as the offshore tool room job in that the attendant was required to frequently lift heavy items, push and pull equipment, and frequently stoop. Mr. Vincent opined that an individual who could not lift fifty pounds could not do his job. He added that he was not being compensated for giving his deposition. Mr. Vincent stated that he had no information about any modified jobs being offered to Claimant in 1997, 1998, or 1999. CX-33, pp. 11-29.

Mr. Vincent testified that on occasion, he did have some assistants in the tool room who were restricted to light duty. He stated that these assistants worked approximately eight hours a day. To the best of his knowledge, the longest period that an assistant worked was three weeks. He added that these individuals were not necessary for him to perform his job. CX-33, p. 98.

Richard Galloway, MSW, Ph.D.

Dr. Richard Galloway testified by deposition that his field of expertise is vocational rehabilitation counseling. He stated that his goal as a counselor is to determine the impact of disability on work ability, and try to assist physically and/or psychologically impaired individuals to reenter the workforce. Dr. Galloway added that he has been involved in vocational rehabilitation work for more than forty years and has been qualified to testify in both state and federal court. He added that his expert testimony is divided equally between claimants and employers. CX-35, pp. 1-4.

He stated that he first saw Claimant on August 16, 2000. He added that he prepared a report based on the records that he was given. Additionally, he reviewed the deposition of Drs. Staats, Ware, Dean, and Armistead after he submitted his report. He stated that those depositions did not change the conclusion reached in his report, dated August 18, 2000. It was his opinion that Claimant's version of his injury and pain were consistent with the medical records. CX-35, pp. 10-13.

Dr. Galloway testified that he administered a Slosson's Intelligence test and a Wide-Range Achievement test when Claimant visited his office for evaluation. He stated that Claimant exhibited post-high school reading skills and an intelligence score in the 52% percentile on the Intelligence test. He added that Claimant's prior conviction of a felony could affect his employability. CX-35, pp. 14-20, 24-25.

It was his opinion, based on the medical records and his evaluation, that Claimant was employable on August 16, 2000. He added that Claimant first became employable approximately two years before the evaluation, because Dr. Zum Brunnen released him to do light/sedentary work. Claimant attributed his lack of employment during this time period to his physical discomfort and his psychological problems. Dr.

Galloway noted that the restrictions placed on Claimant's employment were physical and that there were no psychological restrictions, despite medical evidence of some type of disorder. He added that no one had opined that he was disabled from working from a psychological perspective. As to Claimant's physical restrictions, Dr. Galloway opined that Claimant could not engage in the same types of work that he had done in the past. He stated that in making his evaluation of Claimant's limitations, he gave more weight to Dr. Zum Brunnen, as opposed to Dr. Osborne, because Dr. Osborne did not spend enough time with his patients. He added that Dr. Zum Brunnen was the treating physician and entitled to more weight. CX-35, pp. 14-22.

Dr. Galloway concluded that the ideal jobs for Claimant would be those that were either sedentary or light with no repetitive lifting where Claimant would be able to alternatively sit and stand as needed. Dr. Galloway suggested security guard, fire watchman, used car rental delivery man, and electronic assembly worker as examples of appropriate positions. He opined that the highest salary range for Claimant in those positions would be $8.00 per hour. The availability of the security guard position could also be affected by his prior criminal conviction. Dr. Galloway stated that raising his job classification from sedentary to medium duty work would increase his options approximately ten to fifteen percent. He opined that Claimant's wage earning capacity would not be significantly altered. He gave a local truck driver or delivery van driver as examples of types of positions in this category. He stated that Claimant would be able to perform all of these positions given his current medical condition. Dr. Galloway added that retraining in a vocational or technical field would increase both his options and his wage earning capacity. He did state that it would take time for Claimant to achieve his former level of earnings, but he could potentially earn up to twelve dollars per hour. Dr. Galloway opined that Claimant did not have many transferrable skills to offer an employer without retraining. He added that he has not attempted to locate a specific job for Claimant, because he was only asked to do a vocational rehabilitation survey. Dr. Galloway stated that if Claimant had begun vocational training two years ago, he would have been able to find a higher paying job today. He added that Claimant has the intelligence level to learn or perform most craft-work activities. CX-35, pp. 26-31, 39-44.

II. MEDICAL DEPOSITIONS AND RECORDS

1. DEPOSITIONS

James Z. Brunnen, M.D.[5]

Dr. Brunnen testified by deposition that he is a board-certified, orthopedic surgeon. He stated that his first report on Claimant was dated November 14, 1996, approximately four days after the reported accident. Claimant reported experiencing acute pain concentrated in the right hip area and pelvic area. At that time, Dr. Brunnen diagnosed severe contusion and compression injury of the pelvis. He noted that Claimant's complaints were consistent with the degree of trauma and ordered CT scans of the pelvic area. Dr. Brunnen opined that Claimant could not work and would need to stay on crutches. He stated that the CT scan did not show any evidence of a fracture, but recommended that Claimant be restricted from work until December 3, 1996. Dr. Brunnen stated that Claimant could return to light duty work if his condition improved. He added that Claimant was seen by his partner on November 27, 1996, for repeated complaints of pain. RX-27, pp. 1-7.

Dr. Brunnen testified that he next saw Claimant on December 3, 1996, and reported that Claimant's condition had worsened. A physical examination revealed tenderness around the hip and ischium, part of the pelvis. He next saw Claimant on January 8, 1997, at which time he ordered a bone scan and recommended that Claimant continue his physical therapy. He added that Claimant reported increased lower back pain on this visit. He stated that the bone scan indicated a new fracture in the right side of the pelvis. Dr. Brunnen added that he ordered an MRI of the lower back, which did not show any ruptured discs or herniations. At that time, he gave a prognosis that Claimant should be able to return to work in approximately four weeks. Claimant was taken off physical therapy in February, 1997, because of increased complaints of pain. Dr. Brunnen opined that given the nature of a pelvic fracture, it was not surprising that Claimant's pain continued. He added that he was trying to get Claimant off of the crutches by this point. He stated that he did not make any recommendations for surgery. Dr. Brunnen noted that on March 4, 1997, he did not want to prescribe any opiates for Claimant, as Claimant appeared to be extremely emotional. RX-27, pp. 8-19.

Dr. Brunnen next examined Claimant at the end of March, 1997, and saw no objective signs of injury with his lower back. He stated that the reason he recommended Claimant get off of work was that he should concentrate his time with the rehabilitation process. In April, 1997, Dr. Brunnen noted that Claimant's emotional state had increased, and he was no longer able to manage Claimant's psychological

[5]The medical records and reports from Dr. Brunnen are reproduced as RX-36. These records have been considered by the Court in conjunction with Dr. Brunnen's deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

state. Dr. Brunnen stated that he referred him for psychiatric evaluation. He added that by May 14, 1997, he expected Claimant's pain to have lessened. He stated that at that point, he believed Claimant was able to do light duty work, work that required little physical activity. Dr. Brunnen added that from an orthopedic standpoint, there was no reason why Claimant should not have been able to return to sedentary or light duty work. He stated that he recommended no formal program of treatment at this point, because Claimant would not follow it. Dr. Brunnen added that he was conservative in prescribing medication for Claimant. Dr. Brunnen testified that he ordered additional x-rays in July, 1997, which appeared to be normal with no complications. RX-27, pp. 20-33.

Dr. Brunnen testified that Claimant appeared to be more calm on December 3, 1997. He opined that Claimant's healed pelvic fracture had turned into a chronic pain syndrome. Claimant returned to Dr. Brunnen on February 4, 1998, at which time he found evidence of a pinched nerve problem in the right leg. Dr. Brunnen testified that this developed into a sciatic nerve injury. He stated that Claimant had previously not exhibited any evidence of this condition. He opined, however, that this condition was part of the original fracture and just took time to develop. Dr. Brunnen opined that in May, 1998, he recommended that Claimant could drive a distance of fifty miles as long as he could take breaks when needed. He opined that Claimant reached MMI on May 20, 1998 and ordered a functional capacity evaluation (FCE), because he felt that there were no further tests or treatment that would be beneficial to him. Dr. Brunnen disputed the results of the FCE in that he felt Claimant could only do sedentary to light work. RX-27, pp. 34-50.

Dr. Brunnen gave his work restrictions as no repetitive lifting and no lifting heavier than fifteen pounds. He added that he continued seeing Claimant for follow up evaluations. Between

November and January, 1999, Claimant reported being in an automobile accident. He stated that Claimant was limping with lumbar spine restraint, symptoms that Dr. Brunnen attributed to the automobile accident. However, Dr. Brunnen maintained that these conditions originally stemmed from his work accident. In September, 1999, Dr. Brunnen testified that he ordered further diagnostic testing, a lumbar myelogram and CT scan of the lumbar spine, in order to look for stenoic changes around the nerve root. He stated that he was not able to find anything remarkable in the testing. He opined that Claimant sustained a nerve injury to a portion of the sciatic nerve down in the sacrum and that this injury manifested from the pelvic fracture. He stated that there were no surgical options in Claimant's case. RX-27, pp. 52-62, 82-84.

Dr. Brunnen opined that there were some secondary gain issues involved with Claimant, however, he did believe that Claimant's injuries caused his continued symptoms. He added that he thought Claimant was somewhat manipulative and exaggerated in reporting his symptoms. Dr. Brunnen stated that through September, 1999 and continuing, he felt that Claimant would benefit from employment within the restrictions set for him. He stated that the only further recommendation he would have for Claimant would

be treatment at a chronic pain facility. Dr. Brunnen added that he did not believe that Claimant was either totally or permanently disabled from working in a restricted capacity. He stated that Claimant needed a chronic pain evaluation so that the appropriate doctors would be able to make a recommendation for treatment. RX-27, pp. 63-79.

Phillip Osborne, M.D.[6]

Dr. Phillip Osborne testified that he is board-eligible in occupational medicine. He added that one of his sub-specialties is psycho-physiological medicine. He stated that he has testified as an expert in occupational medicine, and his testimony has never been refused by a court. Dr. Osborne stated that he examined Claimant on July 14, 1998. He gave his objectives in evaluating Claimant as performing an independent medical evaluation in order to determine if Claimant had reached MMI, as well as evaluating the nature and extent of his impairment, if any, and determining how Claimant could function with such an impairment. He stated that he initially reviewed all of the medical records on Claimant's injuries. Dr. Osborne also performed a complete medical examination and ordered additional EMG tests. He stated that it was his opinion, from looking at the EMG nerve conduction studies that Claimant had sustained a direct trauma to the sciatic nerve. It was his opinion that this sciatic nerve injury could have been caused by blunt trauma, i.e. the pelvic fracture sustained in the work accident. Dr. Osborne opined that there was no evidence of a low back disc injury. He stated

that Claimant had reached MMI and rated the sciatic nerve disability as a 12% whole person impairment. RX-28, pp. 2-17, 38-40.

Dr. Osborne stated that the first step in his functional capacity evaluation (FCE) was to evaluate Claimant's cardiovascular conditioning and lifting ability. He also evaluated Claimant's physiological response to exertion. He added that both excessive emotions and medication can effect a FCE, but can be ruled out if carefully monitored. He stated that he had no doubt that Claimant sustained a sciatic nerve injury. Dr. Osborne opined that Claimant could function better when lifting from a standing-up position, as he performed a 250-pound high near lift but only a 149-pound squat lift. He opined that Claimant would probably be in the top third of the population as far as general strength. He stated that activity involving pressure on Claimant's right leg with extended endurance time caused stress. Dr. Osborne stated that Claimant exhibited no stress with progressively picking objects off of the floor or engaging in overhead

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[6]The medical records and reports from Dr. Osborne are reproduced as Health South's records at RX-21. These records have been considered by the Court in conjunction with Dr. Osborne's deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

lifting. He stated that overall Claimant exhibited good strength, but had a problem with endurance. Dr. Osborne attributed Claimant's poor performance during the endurance step test to his leg and not any cardiovascular problems. He concluded that Claimant could easily perform sedentary, light, and medium work. This would include a maximum lift of fifty pounds, with frequent lifting at twenty-five pounds. He opined that Claimant could sit or stand at least a couple of hours with no break, as exhibited during the testing. Dr. Osborne also opined that there was some evidence of psychological issues in the testing, which did affect Claimant's performance. He stated that despite this, Claimant did perform with adequate effort on the administered tests. He stated that Claimant should be able to perform a medium work position for an eight-hour day and a five hour work week. RX-28, pp. 18-33.

He opined that the injury Claimant sustained was static, as it was not going to improve as of the July, 1998 examination. Dr. Osborne also stated that due to Claimant's diagnosed personality disorder, the chances of chronic pain treatment being successful were not good. He ultimately concluded that Claimant had reached MMI and could function within the restrictions that he set forth for employment. RX-28, pp. 35-37.

Paul D. Ware, M.D.[7]

Dr. Paul Ware testified that he is board-certified in psychiatry and board-qualified in neurology. He stated that he evaluated Claimant, performing both a neurological and psychiatric examination, on March 29, 1999. He stated that he reviewed reports from Dr. Joel Ben Hayes, Dr. Kent Dean, and Dr. Staats, as well as Dr. Zum Brunnen and Dr. Osborne. He stated that he got a complete history from Claimant regarding his feelings on his background and the circumstances surrounding the accident at work. Claimant reported taking Paxil and Buspar as medications. RX-29, pp. 3-18.

Dr. Ware first performed a mental status exam in order to determine how Claimant was functioning both psychiatrically and psychologically. He noted that Claimant was alert, cooperative, and well-oriented. There was no evidence of memory cognitive dysfunction or psychomotor retardation. Claimant scored well on abstract thinking and exhibited high level responses. Dr. Ware reported no evidence of suicidal ideation or plan, nor was there any objective evidence of clinical depression at the time of evaluation. Physically, Dr. Ware noted that Claimant walked with a slight limp to his right leg, and was not able to heel/toe walk.

[7]The medical records and reports from Dr. Ware are reproduced as RX-26 and RX-23. These records have been considered by the Court in conjunction with Dr. Ware's deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

He noted some limitation of motion in his back during the neuromuscular exam. He also noted minimal weakness in his right leg, particularly on dorsiflexion of his foot. Claimant had a clearly absent right ankle jerk, which Dr. Ware attributed to an impairment of the right sciatic nerve. He rated Claimant's symptoms as moderate. RX-29, pp. 20-29.

Dr. Ware also performed neurocognitive testing through Dr. Harper, psychologist. She administered the Wechsler Adult Intelligence Scale, the Wide Range Achievement Test, Wahler Physical Symptoms Inventory, the Minnesota Multiphasic personality test, and the Millon Clinical Multiaxial Inventory. Dr. Ware noted that Claimant scored average and low average on his intelligence test. He scored average in reading, low average in spelling, and at the 5th grade level in math. After evaluating these test results, Dr. Ware opined that Claimant was not giving his best effort in these tests. He also concluded that Claimant was reporting an excessive number of physical complaints, higher than average for most psychiatric patients. Claimant's MMPI indicated a psychological disturbance with a long term presence in his personality. He noted that an individual with Claimant's personality makeup would experience more distress than the average person and was prone to symptom magnification. He noted that he did not disagree with Dr. Staats' conclusions, although Claimant did significantly better on his tests than Dr. Staats'. He opined that this improvement may have been due to the Paxil and Buspar that Claimant was taking in the interim. Dr. Ware added that he believed Claimant was prone to secondary gain. Dr. Ware opined from a psychiatric standpoint that if Claimant's litigation would end, his need for regular psychiatric medical treatment would probably end shortly thereafter. He also noted that Claimant was both more self-invested and self-centered than the average person. RX-29, pp. 30-40.

Dr. Ware provided an Axis I, II, III, IV, and V diagnosis. Under an Axis I diagnosis he concluded that Claimant suffered from a major depressive disorder with mild residual. His Axis II diagnosis was a passive dependent personality trait. Under Axis III, he concluded that Claimant sustained a traumatic injury to the right hip with fracture and current neuritis of the right sciatic nerve. His Axis IV diagnosis was moderate psycho social stressor with a noted difficulty in adjusting to his disability and functioning. Under Axis V, Dr. Ware assessed a global assessment of function score (GAF) of 50 with a highest past year of 50. He concluded that Claimant had a history of poly

substance abuse and probable dependency. Dr. Ware opined that Claimant's mild depression would not hamper him from engaging in employment. Dr. Ware found no evidence of Post Traumatic Stress Disorder. He opined that Claimant only needed follow up medical care treating his mild depression for approximately six months after his evaluation in March, 1999. He stated that at the most, Claimant's medication for moods should have been evaluated during that period. Dr. Ware added that he did not think that counseling, in addition to medication was necessary for treatment after this period. Dr. Ware opined that Claimant's depression was not as severe as some of the physicians reported, and Claimant had improved with medication and therapy in the interim. RX-29, pp. 41-62; RX-23.

Dr. Wane opined that neither of the medicines Claimant was taking at the time of evaluation, Paxil and Buspar, would impair his ability to work. He added that counseling might be effective as long as it helped improve Claimant's mental state regarding the accident. Dr. Wane testified that from a neurological and psychiatric standpoint, Claimant was not in need of any type of chronic pain management. RX-29, pp. 79-82, 87.

Kent Dean, Ph.D.[8]

Dr. Dean testified that he received his doctorate in General Counseling and is board-certified by Louisiana in Substance Abuse Counseling. He stated that he counsels individuals under the supervision of a psychologist or psychiatrist. In Claimant's case, Dr. Dean counseled Claimant under Dr. Hayes' supervision. He stated that he received several medical records from Dr. Staats, as well as a letter to Dr. Hayes from Dr. Zum Brunnen. RX-30, pp. 6-32.

Dr. Dean testified that he agreed with Dr. Hayes' narrative report and conclusions, dated May 22, 1997, regarding Claimant's condition. After his assessment on April 30, 1997, Dr. Hayes concluded that Claimant was suffering from major depression with occasion suicidal thinking, as well as severe chronic Post Traumatic Stress Disorder. Dr. Dean noted that Dr. Hayes also concluded that Claimant's depression was independent of his history of alcohol and marijuana abuse. Dr. Dean opined, however, that Claimant's depression and his other behavioral problems could have something to do with marijuana usage. To his knowledge, Dr. Hayes had only seen Claimant twice, with both evaluations taking place in 1997. RX-30, pp. 35-58.

Dr. Dean testified that he began seeing Claimant in 1997. He added that he did not see Claimant again until April 20, 1998. Dr. Dean stated that since October, 1998, Claimant has been regularly attending sessions. Dr. Dean stated that Claimant needs counseling because of a pre-existing disorder. He concurred with Dr. Hayes' diagnosis that Claimant has a borderline, passive-aggressive, paranoia, personality disorder. He added that this condition could explain Claimant's absences from sessions, but that he is now accepting therapy and attending sessions regularly. Dr. Dean testified that Claimant has improved, through treatment, on his obsessivity. He added, however, that Claimant was still obsessed with both the accident and the ensuing litigation. Dr. Dean stated that his focus in therapy was

[8]The reports and communications from Dr. Dean are reproduced as RX-19, RX-35, and CX-26. These records have been considered by the Court in conjunction with Dr. Dean's deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

on Claimant's personality disorder, which would improve his depression and Post-Traumatic Stress Disorder. He stated that all of the criteria Claimant met for Post Traumatic Stress Disorder were based on observation as opposed to objective findings. He concluded that Claimant's depression was due to the accident and exacerbated his pre-existing personality disorder. Dr. Dean opined, however, that Claimant was improving with counseling and his medications. He stated that Claimant's condition was improving with each session. Dr. Dean added that even though Claimant was a symptom magnifier, it was extremely difficult for a malingerer to sustain consistent statements in order to "fake" Post Traumatic Stress Syndrome. RX-30, pp. 60-86, 96-100, 104-110, 140, 171-175.

Dr. Dean opined that after the case was resolved, Claimant would probably improve to the extent that he could be discharged from counseling. However, Claimant would still require medication to regulate his disorder. He also opined that Claimant was mentally disabled from sustaining employment until November 30, 1998, the date when the medication and counseling seemed to improve his condition. He stated that as a counselor, he can give a clinical impression, but not a diagnosis. He stated that Claimant has "residual" symptoms of Post Traumatic Stress Disorder. Dr. Dean added that Dr. Hayes' suggestion in 1997 was to try to get Claimant back to work as soon as possible from a psychiatric standpoint, and he determined that Claimant has been able to work since June, 1999 but has not. RX-30, pp. 118-153, 175-176.

Thomas E. Staats, Ph.D.[9]

Dr. Thomas Staats testified that he is a specialist in clinical neuropsychology as well as a general psychologist. He stated that he was consulted in Claimant's case by Dr. Hayes to perform a counseling psychology evaluation. Dr. Staats testified that he administered the Minnesota Multi-Phasic Personality Inventory, the Mellon Clinical Multi-Axial Inventory III, the CRIT Neurologically Corrected MMPI, and a clinical interview. He opined that during the Mensana Pain Test, Claimant fell into the exaggerating pain patient category, otherwise known as a symptom magnifier. He stated that Claimant's profile was common to individuals with agitated depressions. He stated that his testing showed a residual Post Traumatic Stress Disorder with elevations on all three PTSD scales. He added that Claimant was probably experiencing a little pain, but greatly exaggerated the pain when reporting it. Dr. Staats opined that Claimant suffered from a borderline personality disorder, pre-existing

[9]The reports and testing results from Dr. Staats are reproduced as RX-18. These records have been considered by the Court in conjunction with Dr. Staats' deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

the accident, resulting in distortions of reality. He noted passive-aggressive traits in Claimant, which would make him prone to significant mood instability and chronic negativism. Dr. Staats stated that Claimant would be prone to blaming all of his mental problems on the accident due to the fact that he perceived himself as a "victim." He added that the accident aggravated this pre-existing condition. RX-31, pp. 2-18, 35-40.

Dr. Staats testified that Claimant was agitated, depressed, and obsessed about perceived mistreatment from his doctors. He also concluded that Claimant suffered from an agitated major depressive disorder, manifesting mainly in anger and irritability. He determined that this disorder was mixed with borderline, passive-aggressive, and paranoid features. Dr. Staats concluded that symptom magnification was not conscious manipulation, but noted that Claimant did exhibit some fake bad indicators. Dr. Staats opined from a psychological perspective that at the time he evaluated Claimant, Claimant was too agitated and angry to return to work. He added, however, that he did not believe that Claimant was totally or permanently mentally disabled. He stated that individuals with these types of personality features have problems with rehabilitation and often unconsciously sabotage their own progress. He added that it did not surprise him Claimant was not working. Dr. Staats also testified that there was nothing in Dr. Ware's report that he strongly disagreed with. RX-31, pp. 21-27

Dr. Staats evaluated Claimant's GAF score as indicating a moderately severe level of impairment. This score indicates that Claimant's emotional symptoms are disrupting his day to day activities, quality of life, and functioning. He opined that Claimant's personality disorder would most likely improve when he begins working, because his mind will be distracted from his problems. However, he added that Claimant would probably resist efforts to return to work due to his personality disorder. RX-31, pp. 55-62.

2. REPORTS & RECORDS

Records from Dauterive Hospital

An x-ray interpretation, dated November 10, 1996 and interpreted by Dr. C.C. Lewis, indicates that Claimant had no significant abnormality in his pelvis and right hip. Dr. Lewis noted that the x-ray showed a radiolucent line across the right side of the symphysis pubis, which was not identified on other views. Dr. Lewis's opinion was that it did not appear to be a fracture. RX-11, p. 12.

Records from Mid South Orthopedics and Sports Medicine Center, L.L.C.

Respondent presented several records from the Mid South Orthopedic Center. The materials will be discussed in conjunction with Dr. James Zum Brunnen's deposition testimony. *See* RX-12, pp. 1-157. Specifically these records note that Claimant was referred to Drs. F. Glenn Sholte and Dr. Kathleen

Majors at a chronic pain clinic. *See* RX-12, pp. 4-10. The records also contain a notation that Claimant was unable to drive more than 50 miles. *See* RX-12, p. 60.

Records from Schumpert Medical Center

Records from this center indicate that Claimant underwent a lumbar myelogram with a CT scan in October, 1999. Results were given as a slight irregularity of the left anterior acetabular region. He noted a slight asymmetry of the iliac bones, which was attributed to an old trauma. An irregularity in the pelvic area was noted and attributed to old, healed fractures or old trauma. The CT scan following the myelogram at L3-4 showed a slightly small canal associated with some facet hypertrophy. The report described a slight annular bulge at L4-5, but no significant abnormalities. At L5-S2 a minimal annular bulge without central effects was noted. The impression was given as a slightly small canal and minimal spinal stenosis at L3-4. RX-13, pp. 1-16.

The myelogram results were grossly unremarkable. There was a very mild circumferential narrowing of the thecal sac at L3-4 and L4-5 levels. Some disc space narrowing was noted at the L5-S1 level with mild facet prominence. Progress notes indicate that Claimant was treated at home with Lortab 10. RX-13, pp. 16.

An MRI given in February, 1998 showed a congenital narrowing of the spinal canal at the L3-4 and L4-5 levels. There were no acute abnormalities, disc herniations, foraminal stenosis, or high grade central stenosis appreciated. RX-13, pp. 21.

A bone scan, given in January, 1997, showed increased activity in the left sacral iliac region. The interpreting physician noted a need for an MRI of the pelvic region. RX-13, pp. 22-23.

A CT scan of Claimant's pelvis, done in November, 1996, was normal with no evidence of acute fracture or bone destruction. RX-13, p. 26.

Records from Tietjen Physical Therapy

Claimant was seen and evaluated for physical therapy on December 4, 1996. He complained of significant right hip pain stemming from a work-related accident offshore. Claimant complained of discomfort in the ischial tuberosity region and right groin pain. The report notes that Claimant was

ambulating on crutches without difficulty and would be slowly able to put more weight onto his leg. An examination revealed that Claimant is fully independent with all transitional movements, but very slow and gradual with the right lower extremity. The most discomfort reported was during internal/external rotation

and full flexion/adduction. Paul Bellotte, physical therapist, gave his impression that Claimant sustained a sprain/strain to the right hip and opined that Claimant would benefit from physical therapy, attending sessions approximately three times per week for four to six weeks.. RX-14, p. 1-3.

Records from Shahidul Islam, M.D.

Claimant was seen by Dr. Islam in December, 1996. He reported problems with food, sleep, sex, chronic pain in his right hip/leg, chronic fatigue, and panic attacks. Claimant gave his mental symptoms as a fear of not being in control, depression, unresolved grief, insomnia, and difficulty with concentration and memory. RX-15, pp. 1-6.

Records of Orthopedic Specialists of Louisiana

Claimant was seen on December 14, 1997 and reported a work-related injury offshore. Claimant reported that he was being treated with medication, injections, and rest. However, he stated that he was not receiving any benefit by this treatment at Dr. Zum Brunnen's office. His main complaint was around the right hip area towards the ischial tuberosity on the right side. Claimant noted that his condition had somewhat improved since the date of the accident. RX-16, pp. 8-9, 12.

A progress report, dated December 27, 1996, indicates that Claimant reported a fall on his crutches, which aggravated his hip pain..Claimant reported most of his pain as being concentrated in the right hip, both anteriorly and posteriorly and around his ischial tuberosity area posteriorly. Claimant also complained of pain around his left hip. Dr. Lewis Jones, the examining physician, opined that he could not explain Claimant's continued complaints. RX-16, pp. 1-2.

Records for Tri-State Physical Therapy

Claimant was seen at this clinic several times a week from December, 1996 through May, 1997. On March 24, 1997, Claimant reported not using crutches for several weeks due to improved mobility and decreased pain. RX-17, pp. 82-84.

Additionally, he was given work hardening therapy towards the end of his treatments. Progress notes dated May 23, 1997, indicate that Claimant reported Dr. Zum Brunnen placed his work hardening sessions on hold due to complaints of pain. RX-17, pp. 1-14.

Records of David N. Adams, M.D.

Claimant was seen by Dr Adams on July 22, 1998. He reported sustaining injury while welding in 1996. Claimant reported chronic lower back pain into both lower extremities with the right being worse than the left. Dr. Adams performed both a physical examination and electrodiagnostical examination on both lower extremities and related lumbar paraspinal muscles. Dr. Adams found occasional abnormal membrane irritability with more pronounced findings noted in the medial head of the right gastrocnemius muscle. He noted normal nerve conduction velocities in the right peroneal and posterior tibial nerves as well as normal right sural ankle delay. Dr. Adams noted no response in the right tibial H-reflexes and normal response in the left. His ultimate diagnosis was that the results were consistent with a right sciatic neuropathy. RX-20, pp. 1-3.

Records from Louisiana State University Health Sciences Center

Claimant was admitted to the emergency room of the Center on January 20, 1999 in conjunction with an automobile accident. He complained of neck and back pain. Claimant reported that he sustained a crushed pelvis in November, 1997 while working offshore. Claimant was given a diagnosis of contusion to the neck and back as well as a cervical strain. RX-22, pp. 1-2.

Records from Charles Armistead, Sr., M.D.

Claimant was seen by Dr. Armistead on July 25, 2000. At that time he noted that Claimant's condition was improving, but that he continued to experience chronic pain in his hip, lower back, and right lower extremities. RX-24.

3. OTHER EVIDENCE

VOCATIONAL REHABILITATION EVIDENCE

Job Description Analysis

Respondent submitted a job description analysis, dated April 1, 1997, for the tool room attendant position offered to Claimant. This report was completed by Lynette Sigue and Roger Bagwell. The description of this position is that it is primarily sedentary and rarely involves standing or walking. The tool room attendant would do no lifting, carrying, pushing, or climbing and would rarely be required to reach for items. It would be an outside position, and Claimant would be allowed to sit, stand, or walk as needed. RX-6

Nancy T. Favaloro, MS, CRC

Nancy Favaloro provided a vocational rehabilitation report for Claimant dated November 16, 2000. In this report she concludes that Claimant has a work history of unskilled or semi-skilled employment. She opined that Claimant has an average aptitude in general intelligence, indicating that he can learn new job tasks through on the job training or demonstration. She stated that Claimant's options could include operating a crane, a light duty position, as he had indicated that he had done so in the past. This position would involve operating the crane and climbing in and out of the machine. Wages would range from $12.00 to $20.00 per hour. RX-32, pp. 3-4.

After performing a labor market survey in the area of his residence, Ms. Favaloro concluded that the following positions were available for Claimant given his transferrable skills and medical restrictions for light to medium work:

1. Used Car Sales Representative:	Claimant would assist customers with the purchase of used cars. Wages range from $20,000 to $40,000 annually.
2. Route Sales	Claimant would fill vending machines with both soft drinks and chips/snacks. The heaviest item he would be required to lift would weigh approximately twenty-two pounds. Dollies would be used to transport cases of goods to the businesses. Wages range from $300 to $400 weekly.
3. Production Worker	Claimant would stand while working and have regularly scheduled breaks. The lifting would be less than five pounds. Wages would be $5.65 per hour.
4. Parking Lot Cashier	Claimant would be required to either sit or stand in a parking booth and do basic math skills. Wages would range from $5.15 to $6.00 per hour.
5. Steward	Claimant would work in a local casino loading a dishwasher. This position requires standing while working and sitting during breaks. The lifting is occasionally twenty pounds. Wages would be $6.00 per hour. RX-32, pp. 1-6

BENEFITS/BILLS PAID

In addition to the stipulated amounts, Respondent submitted several records of compensation and medical benefits paid to Claimant for the following periods of time:

Temp. total November 10, 1996 - November 2, 1997 $245.12; 51 weeks $17, 601.12. RX-5.

Unspecified payment from February 4, 1998 to October 6, 1998 $245.12; 35 weeks. RX-5.

Temporary total disability running bi-monthly from March 25, 1997 to September 10, 1999. These records were accompanied by sheets showing payment of numerous medical bills. RX-7.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses who testified at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

I. NATURE/EXTENT OF DISABILITY AND MAXIMUM MEDICAL IMPROVEMENT

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. See Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical

improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. See Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); See Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

A judge must make a specific factual finding regarding maximum medical improvement and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, the judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708 (1978).

If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

In the present case, the fact that Claimant sustained both physical and mental injury is undisputed. With regard to the nature of Claimant's physical condition, this Court finds that Dr. James Z. Brunnen's medical opinion is entitled to determinative weight. The evidence indicates that he was Claimant's treating physician and evaluated Claimant on a regular basis from the time of injury. He initially diagnosed Claimant's injury as a pelvic fracture. *See* RX-27. However, he, along with Dr. Osborne opined, to a reasonable degree of medical certainty that the subsequent sciatic nerve injury resulted from the pelvic fracture. *See* RX-27; RX-28. Dr. Brunnen opined, in correspondence

dated May 20, 1998, that this physical condition, the sciatic nerve injury stemming from the pelvic fracture, was permanent and would not improve. *See* RX-12. He gave a maximum medical improvement date of May 20, 1998. *See* RX-27. Since Dr. Brunnen is Claimant's treating physician for purposes of evaluating Claimant's physical condition, this Court will take his medical opinion as determinative of the issue. Therefore, Claimant reached maximum medical improvement with his physical condition on May 20, 1998. As such, Claimant's physical injury is permanent in nature.

As to Claimant's psychological/psychiatric injury, credible medical testimony indicates that Claimant has a pre-existing personality disorder, which was aggravated by the work-related accident. *See* RX-29; RX-31. Dr. Ware, psychiatrist, examined Claimant on March 29, 1999, and gave a diagnosis of a major depressive disorder with a passive, dependent personality trait. *See* RX-29. These findings were similar to Dr. Hayes' diagnoses, who examined Claimant in 1997. *See* RX-30. After examining Claimant's records, however, Dr. Ware opined that Claimant's condition had improved from 1997 to the time of his evaluation in 1999. *See* RX-29. He added that Claimant's mental condition would have improved further during that time if he were employed. *See* RX-29. Dr. Dean, Claimant's counselor, also opined that Claimant's depression and anxiety had improved during this period. *See* RX-30. Up to that point, Claimant had not been declared permanently disabled regarding the condition by either an examining psychiatrist or his counselor at the time he reached MMI with his physical injury. *See* RX-29; RX-30. Since Dr. Ware evaluated Claimant in 1999, Claimant's mental injury extended beyond that date of MMI for his physical injury. Dr. Ware concluded, however, that Claimant's mental distress and depression caused by the accident should have improved in the six months following his evaluation. Dr. Dean, on the other hand, opined that Claimant's mental problems would continue for a short period after the instant litigation concluded. This Court recognizes that Dr. Dean, as Claimant's counselor, had more opportunities to evaluate Claimant than Dr. Ware. However, this Court places determinative weight on Dr. Ware's testimony, given that he was the most recent psychiatrist to provide a medical and psychiatric opinion on Claimant's mental condition. Therefore, after examining the psychiatric evidence on the record, this Court finds that Claimant reached maximum medical improvement as to his psychiatric condition on October 29, 1999. Thus, Claimant's entire disability became permanent in nature on that date.

The extent of disability can be either partial or total. Total disability is a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work-related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

In the present case, Claimant presented credible, medical evidence from Dr. Brunnen that he was unable to work from the date of the accident, November 10, 1996 to October 6, 1998. *See* RX-27. Claimant was subsequently released to light duty with no repetitive lifting and no lifting heavier than fifteen pounds. *See* RX-27. While this Court notes that Dr. Brunnen did approve Claimant for light duty work as early as May, 1997, his approval was based on his assessment of Claimant's physical condition. It is evident to this Court, however, that Claimant was still unable to work due to his documented mental problems. Therefore, even if Claimant was able to physically make the fifty-mile commute to Respondent's facility for a light duty position, his mental condition would have still prevented him from being employable during this period. The psychiatric evidence in the record, shows a steady improvement in Claimant's mental condition after October, 1998. *See* RX-30. Dr. Hayes, Claimant's psychiatrist, prescribed medication for Claimant. *See* RX-30. Dr. Dean opined that this medication, in combination with the counseling, was the reason for his continued improvement. However, he noted that Claimant continued to exhibit signs of obsessive behavior, regarding employment and the present litigation. *See* RX-30. After examining Claimant's records and conducting a personal evaluation in March, 1999, Dr. Ware, psychiatrist, also noted that Claimant appeared to be improving through counseling and medication. *See* RX-29. However, signs of depression and obsessivity were still evident. *See* RX-29. Therefore, on the basis of the medical evidence provided, this Court finds that Claimant has established that he was not able to return to his regular employment or similar employment due to his physical and mental injuries. He has sufficiently proven a complete loss of wage earning capacity and established a prima facie case for total disability from the accident on November 10, 1996.

Total disability, and loss of wage earning capacity, becomes partial on the earliest date that the employer establishes suitable alternative employment. See Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, physical restrictions, and an opportunity that he could secure if he diligently tried. See New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); See McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

Respondent presented Ms. Sigue's testimony showing that it tendered two light duty positions, offshore dispatcher and tool room attendant, to Claimant in 1997. *See* RX-33. This Court finds Ms. Sigue's testimony credible regarding both the tender of the jobs and the duties required in the described positions. David Bartley and Whitney Vincent testified that the tool room attendant was required to do much more than the written job description provided for. However, this Court notes that both of these

individuals were employed in the offshore area of Respondent's operations,

and were not sufficiently aware of the activities in the onshore toolroom. This is confirmed by Ms. Sigue's testimony that Respondent did have both an onshore and offshore toolroom, and both required different activity levels. The tool room attendant position, in particular, was expressly approved by Claimant's orthopedist as an appropriate light duty position. *See* RX-27. In May, 1998, Dr. Brunnen also approved the fifty-mile commute to the toolroom, on the condition that Claimant be able to make frequent stops. *See* RX-27. However, while these light duty positions offered by Respondent may have met Claimant's physical restrictions for work, there are several aspects in this case that make these positions unsuitable.

First, Dr. Brunnen, Claimant's orthopedist, initially requested that Claimant focus on his physical therapy sessions. *See* RX-27. However, both of these jobs that Respondent tendered would require Claimant to make a lengthy commute and work a five-day work week. Therefore, Claimant would not logically be able to attend regular therapy sessions during the week, consistent with Dr. Brunnen's instructions. Additionally, in April, 1997, Claimant was referred to Dr. Hayes and began attending therapy sessions held by Dr. Dean. Claimant has continued these counseling sessions, and has regularly attended since October, 1998. Claimant would experience the same problem scheduling his therapy session during the week as he would with his physical therapy appointments. Therefore, this Court finds that the two job offers tendered to Claimant in 1997 were not suitable for Claimant due primarily to his mental health treatment. However, Dr. Ware opined that the need for counseling with a therapist would diminish by October, 1999. Therefore, this Court finds that the tool room attendant position in Respondent's onshore tool room became suitable at that time, given Claimant's training, medical treatment requirements, and physical restrictions. Ms. Sigue also testified that the job was available for Claimant until her last month of employment, which was March, 2000. After evaluating this testimony, the Court finds that Respondent has established suitable alternative employment through March 1, 2000. Since this job paid Claimant his pre-accident wage rate, he sustained no loss of wage earning capacity from October 30, 1999 through March 1, 2000.

Claimant also asserts that these two light duty positions were "sheltered employment." A showing that the Claimant has been employed in "sheltered employment" is insufficient to establish suitable alternative employment. See Harrod v. Newport News Shipbuilding & Drydock Co., 12 BRBS 10 (1980). Sheltered employment is a job for which an employee is paid even if he cannot do the work and which is unnecessary. See Id. Claimant has presented no evidence to indicate that either the dispatching position or the tool room attendant position were unnecessary to Respondent's operations. To the contrary, Ms. Sigue testified that both positions were necessary to Respondent's business. *See* RX-33. Additionally, the fact that the positions were described as "transitional" does not mean that the position

existed at the beneficence of the employer. Respondent presented evidence that these positions were to help injured workers get back into the workforce. Not only is there no evidence that these positions were created for Claimant, Ms. Sigue testified that these

positions were in existence prior to his injury. Therefore, this Court finds no evidence that Respondent tendered a "sheltered employment" position to Claimant.

Respondent also submitted a vocational rehabilitation report prepared by Nancy T. Favaloro. *See* RX-32. This report demonstrated various job openings in the Shreveport area where Claimant resides. Both sedentary and active security guard positions would be unavailable for Claimant, given that he has a criminal record. *See* RX-32. This is consistent with Dr. Galloway's opinion that Claimant would be restricted in his job possibilities due to his criminal record.

Additionally, the listed route sales and steward positions would not be suitable for Claimant due to both the weight and the repetitive nature of the lifting involved. While the used car position seems suitable and available, it is not evident from the report as to whether the wages given are based on commission or straight salary. Therefore, this Court will not consider that position in calculating suitable alternative employment. However, this Court finds that several of the other listed positions, would be feasible for the Claimant. Claimant has the experience for the crane operator position, which, as described in the report, fits within his physical restrictions. Both the parking lot cashier position and production worker position would allow Claimant to either sit or stand, although the production position requires more standing. The crane operator position pays from $12.00 to $20.00 per hour, while the production worker, and parking lot cashier positions pay on average $5.50 per hour. After averaging these wage figures presented in Ms. Favaloro's report, and after consideration of Dr. Galloway's testimony, this Court finds that Respondent has proven suitable alternative employment for a position paying approximately $10.00 per hour. For an eight-hour day and a five-day work week, this would yield a weekly wage of $400.00.

Since Respondent has provided sufficient evidence of a realistically available job opportunities that Claimant is capable of doing, Respondent has established two types of suitable alternative employment. Respondent's tender of the offshore dispatcher and tool room attendant positions were sufficiently proven suitable and available from October 29, 1999 through March 1, 2000. Since those positions would pay Claimant his pre-accident wages, he sustained no loss of wage earning capacity for that period. However, beginning on March 2, 2000 and continuing, Respondent established suitable alternative employment through Ms. Favaloro's report in the amount of $400.00 per week. Since Claimant's pre-accident average weekly wage was $517.68, Claimant has sustained only a partial loss of wage earning capacity for that period of time. *See* JX-1. Thus, Claimant's compensation rate from the stipulated average weekly

wage will be diminished accordingly. Claimant also made a claim for vocational rehabilitation benefits. *See* CX-3. However, there is no evidence that Claimant either sought or was denied said benefits. Therefore, consistent with this opinion, since Claimant is entitled to workers' compensation benefits, he is not precluded by this Court from taking advantage of vocational rehabilitation services offered by the Department of Labor.

II. REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curium), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. See Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g. 6 BRBS 550 (1977).

Section 7(d)(2) of the Act provides in pertinent part that:

> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so. 33 U.S.C. § 97(d)(2).

In this case, the fact that Claimant sustained both physical and mental injury from a work-related injury is undisputed. *See* JX-1. Additionally, there is sufficient medical evidence in the record to indicate that Claimant's pelvic fracture, sustained during the accident, caused a sciatic nerve injury on his right side. Therefore, he is entitled to all properly authorized and reasonable medical benefits stemming from this condition. Dr. Brunnen, Claimant's treating physician opined that future surgery was not an option for Claimant. *See* RX-27. He did suggest, however, that Claimant attend a chronic pain management clinic for evaluation. *See* RX-27. Therefore, this Court finds that a chronic pain management evaluation would be a reasonable and necessary expense for Claimant, because it is connected to his physical injury.

Claimant is also entitled to reasonable and necessary benefits for his mental injury sustained as a result of his work-related accident. While there is evidence to indicate a pre-existing personality disorder, it is also evident from psychiatric testimony, that this condition was exacerbated by his work-related accident and is compensable. Thus, Claimant is entitled to reasonable and necessary past and future compensable psychiatric treatment and medication associated with this work-related injury.

Both Claimant and Respondent testified as to the mileage that Claimant was required to drive in order to obtain medical treatment. Mr. Montalbano testified that Carrier had paid appropriate mileage to Claimant for all verifiable medical visits. *See* TR. at 136-183. His correspondence to that effect was reproduced as CX-37. This Court finds that his requirement of verification from the medical facility reasonable. Additionally, this Court finds that Mr. Montalbano's method of computing mileage, based on a standard figure in the Shreveport area, reasonable given the fact that Claimant testified that he frequently changed addresses. Therefore, this Court finds that Respondent is liable only for any unpaid past and future mileage expenses, based on this method of calculation, that are verified by the appropriate medical facility.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant any unpaid compensation for temporary total disability benefits from November 10, 1996 until October 29, 1999, based on an average weekly wage of $517.68;

(2) Employer/Carrier does not owe any compensation benefits to Claimant for permanent disability from October 30, 1999 to March 1, 2000 due to the suitable alternative employment available at its facility, which paid pre-accident wages. Claimant sustained no loss of wage earning capacity during this time.

(3) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits from March 2, 2000 and continuing, subject to the limitations in the Act, based on an average weekly wage of $517.68, minus the suitable, alternative employment wages of $400.00 per week;

(4) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date this decision and order is filed with the District Director. See 28 U.S.C. §1961;

(5) Employer/Carrier shall pay or reimburse Claimant for reasonable and necessary medical expenses, with interest, in accordance with §1961;

(6) Employer/Carrier shall pay of reimburse Claimant for any unpaid mileage based on the reasonable method of calculation and verification provided by Carrier;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this 25TH day of June, 2001, at Metairie, Louisiana.

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JAMES W. KERR, JR.

Administrative Law Judge

JWK:sls